STATE OF MICHIGAN

COURT OF APPEALS

ALLIE M. KHALIFEH,

Plaintiff-Appellant/Counter-Defendant,

v

FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, FARM BUREAU ANNUITY COMPANY, COMMUNITY SERVICE ACCEPTANCE COMPANY,

Defendants-Appellees/Counter-Plaintiffs,

and

ZOUHOUR ANOUTI a/k/a ROSE ANOUTI d/b/a ANOUTI INSURANCE AGENCY,

Defendant.

UNPUBLISHED
October 16, 2007

No. 271598
Wayne Circuit Court
LC No. 04-428831-CK

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff, Allie M. Khalifeh, appeals as of right from the trial court's order granting summary disposition in favor of defendants, Farm Bureau Life Insurance Company of Michigan, Farm Bureau General Insurance Company of Michigan, Farm Bureau Annuity Company, Community Service Acceptance Company[1] in this action to recover unpaid insurance

[1] The remaining defendant was dismissed by stipulation of the parties in the trial court below and is not a party to this appeal.

commissions. Because the trial court properly granted summary disposition in favor of defendants, we affirm.

I

Plaintiff was an independent contractor authorized to act as an agent with all defendant Farm Bureau companies. Plaintiff executed both a Farm Bureau Insurance Agent Agreement (Farm Bureau Agreement) and a Community Service Acceptance Company Solicitor Agreement (CSAC Agreement) on December 1, 2002. Plaintiff sold insurance policies as an at-will employee, required to comply with defendants' rules and regulations in binding insurance coverage. In exchange for his sales and servicing of insurance products, the agreement provided for plaintiff to receive compensation according to "schedules attached to and forming part of" the agreement.

The schedule is the Agent Commission Schedule, which defendants had the right to modify. The Agent Commission Schedule provided for commissions, as well as "extended earnings" that are paid on termination of the agent agreement. Pursuant to the contract, defendants had the right to terminate extended earnings "immediately if the Agent violates any rule or regulation of any of the Companies, fails to comply with any of his/her obligations under the Agent Agreement, commits and/or is convicted of a criminal act against any of the Companies, violates any regulation of the Michigan Insurance Bureau, and/or violates a Michigan Insurance Law."

According to defendants, they terminated plaintiff on February 19, 2004, after learning that plaintiff was knowingly submitting automobile insurance applications to defendant with false vehicle address locations listed on the applications in violation of both the Farm Bureau Agreement and the CSAC Agreement. After his termination, plaintiff filed a complaint seeking to recover extended earnings on his book of business. In his complaint, plaintiff alleged breach of contract of both the Farm Bureau and CSAC agreements, defamation, and intentional infliction of emotional distress against defendants.

Defendants answered and also counterclaimed against plaintiff seeking a declaration that it properly terminated plaintiff's rights to extended earnings alleging breach of contract, conversion, breach of fiduciary duty, and fraud and misrepresentation. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) finding specifically that no material question of fact remained regarding whether plaintiff violated defendant's contractual rules and underwriting rules. The trial court ruled that due to the violations, defendant was empowered to terminate plaintiff and deny his request for any post-termination commissions under the contracts. It also found no basis for plaintiff's defamation and intentional infliction of emotional distress claims.

II

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich

331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005).]

III

Plaintiff first argues on appeal that the trial court erred when it considered an investigative summary prepared by Douglas Kane in deciding the motion for summary disposition because it was substantively inadmissible. Our Supreme Court has stated, "[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Inadmissible hearsay is insufficient to satisfy the court rule. *Marlo v Beauty Supply, Inc, v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (1998). Plaintiff argues specifically that the summary was substantively inadmissible and should not have been considered by the trial court because it was an investigator's report and contained inadmissible hearsay. Plaintiff does not expand on this assertion and does not provide any binding support for this proposition. Defendants counter that the report was admissible as a summary of evidence pursuant to MRE 1006, and in the alternative, because Kane's deposition testimony was also part of the record, any error was harmless.

To support admissibility under MRE 1006, the proponent must show that: (1) the summary was of voluminous writings, recordings, or photographs which cannot conveniently be examined in court; (2) the underlying materials must themselves be admissible in evidence; (3) the originals or duplicates must be made available for examination or copying by other parties; and (4) the summary must be an accurate summarization of the underlying materials. *Hofmann v Automobile Club Ins Ass'n*, 211 Mich App 55, 100; 535 NW2d 529 (1995), quoting *White Industries v Cessna Aircraft Co*, 611 F Supp 1049, 1070 (WD Mo, 1985).

Here, the "Investigative Summary" satisfied those conditions. Kane's summary indicated that the investigation included review of *all* active and inactive personal automobile policies written by plaintiff. The investigation then focused on discrepancies found in over 95 automobile policies. These represent a significant number of policies that could not conveniently be viewed in court. Next, we find no error regarding the second element. Clearly, the

underlying policies would be admissible. And regarding Kane's investigative process of examining the policies and investigating them outlined in the report, Kane testified at length in his deposition regarding the investigation, the review process, and the discrepancies referenced in the summary he prepared. Finally, plaintiff does not challenge the third and fourth elements, that they were available for examination and the accuracy of the summarization of the materials. Consequently, we are not persuaded that the trial court improperly referenced the summary especially in light of the fact that the author, Kane, was deposed.

IV

Next, plaintiff argues that the trial court erred in finding that plaintiff violated defendants' underwriting rules and procedures as a matter of law. Plaintiff contends that there is no evidence that he or his staff violated any of defendants' underwriting rules or procedures. Defendants counter that the record plainly shows that plaintiff systematically submitted applications for automobile policies listing garage addresses that differed from the residence addresses in violation of the underwriting rules and procedures constituted grounds for termination of extended earnings.

A question of contract interpretation is reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). The purpose of contract interpretation is to enforce the parties' intent, and if language of the document is unambiguous, interpretation is limited to the actual words used. *Id.,* at 656. Accordingly, a clear contract must be enforced according to its terms. *Id*. Unless otherwise defined, contractual language is given its plain and ordinary meaning. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004).

Defendants cite the provision that prohibits plaintiff from improperly binding the company or waiving its rights:

> The Agent shall not make, alter, or discharge any contract of insurance; waive any policy provision . . . or alter, waive or forfeit any of the Companies' rights, requirements, or conditions in any policy of insurance, or otherwise obligate the Companies in any way, except . . . as otherwise authorized in writing by the Companies.

Further, review of defendants' pricing policies specifically state that:

> Pricing is based on:
>
> · the coverages selected
>
> · where the automobiles are usually garaged

And plaintiff's wife, Fatme Khalifeh who sometimes worked for plaintiff taking information for defendants' policies and giving rates testified specifically that she "knew that they shouldn't have a different address for their automobile policy than the address where they lived[.]"

The record reveals 95 instances where automobile policy submission addresses contained discrepancies regarding where the automobiles were "usually garaged." One instance in particular is the Raef Timani claim file. Douglas Kane testified that his investigation revealed that plaintiff submitted an automobile policy application with a garage address in Farmington Hills for Timani. Just two days later plaintiff submitted a homeowners' policy with a primary address in Dearborn. Kane's investigation revealed that the Farmington Hills address was actually a beauty salon owned by Tamini and no garage was located at the business in an office park. However, the Dearborn address was a residence. Defendants' rates stated that premiums charged for vehicles "usually garaged" in Farmington Hills were less than premiums charged for vehicles "usually garaged" in Dearborn, which was the case for the Tamini claim file.

Plaintiff, by way of his submission of policy applications with address discrepancies was able to obtain coverage at reduced premiums for policies that otherwise would not have been issued at that rate for coverage. In so doing, plaintiff "obligate[d] the Companies" where they would not otherwise have been obligated. Plaintiff thereby failed to comply with his obligations under the agent agreement. Thus, the trial court did not err in finding that no material issues of fact remained regarding whether plaintiff violated defendants' underwriting rules and procedures as a matter of law. Plaintiff has shown no error.

V

Plaintiff also argues that the trial court erred in concluding that plaintiff's tort claims were not separate and distinct from his contract claims. Defendants assert that the trial court's statement regarding plaintiff's tort claims as distinct from contract claims was error but was harmless because the trial court considered the substance of the tort claims. In ruling on the motion, the trial court made the following statement:

> As to the tort claims, when you have a contract, you can't have a tort claim unless they're separate and distinct from the contract claim, which I don't believe they are in this case. They're all intertwined with the contract claim.

Defendants admit in their brief on appeal that the torts plaintiff alleged in his complaint were intentional torts separate and distinct from any contract obligation and not allegations of negligence arising out of contract performance. Thus, defendants concede the trial court's statement was error citing *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 52; 649 NW2d 783 (2002). A review of the record reveals, however, that after making the erroneous statement, the trial court went on the address the merits of the both plaintiff's intentional tort counts, defamation and intentional infliction of emotion distress. Hence, we conclude that any error caused by the errant statement was harmless.

VI

Plaintiff argues that the trial court erred in concluding that defendants' raid of plaintiff's office was not extreme and outrageous conduct to support his claims of intentional infliction of emotional distress as a matter of law. Defendants' contend that the trial court properly concluded that plaintiff's intentional infliction of emotional distress claim failed as a matter of law because nothing about defendants' action in terminating the agreement and exercising their contractual rights to reclaim their property was extreme and outrageous.

Although our Supreme Court has not formally recognized the tort, this Court has accepted intentional infliction of emotional distress as a viable tort for more than twenty years. See *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 350; 351 NW2d 563 (1984). "To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). "The threshold for showing extreme and outrageous conduct is high." *Roberts v Automobile-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

The initial determination regarding whether defendants' conduct could be reasonably deemed extreme and outrageous is for the trial court. *Sawabini v Desenberg*, 143 Mich App 373, 383; 372 NW2d 559 (1985). "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). Further, to succeed in showing that the plaintiff has suffered "severe emotional distress," evidence must establish that "the distress inflicted is so severe that no reasonable man could be expected to endure it." *Roberts, supra* at 608-609, quoting Restatement Torts, 2d, § 46, comment j, p 77. The court must consider the allegedly tortious conduct in context. *Rosenberg, supra* at 351-352.

Taken in context, the evidence here indicates that defendants' conduct was neither extreme nor outrageous. Plaintiff testified that on February 19, 2004 when he arrived at his office he encountered defendants' personnel. Tom Parker handed him a termination letter and explained that defendant would be removing Farm Bureau files and materials from plaintiff's office. Plaintiff testified that defendants' personnel looked like "people from government enforcement" and were dressed in a formal manner that scared him. He also stated that some customers had been present when defendants' personnel arrived and were panicked and started asking questions about what was happening. He stated that most customers left the office but some watched through the window. He also stated that one of his employees was shaking and crying and another needed to be calmed down. He also objected to the violent way defendants' personnel were taking the files and that he believed they were "attacking" his office. Plaintiff stated that the removal lasted about six hours and defendants' personnel used the back door to remove the files. Plaintiff acknowledged that there was never any yelling or shouting at him or other office employees, that he was never physically threatened with violence, and that his wife was also present with him the entire day.

After reviewing the record in the light most favorable to plaintiff, we conclude that defendants' conduct on the day in question was neither atrocious nor outrageous. The evidence was simply insufficient to establish that conduct by defendants' employees caused "distress . . . so severe that no reasonable man could be expected to endure it." *Roberts, supra* at 608-609.

Additionally, when a party merely insists on their legal rights, even though they may be aware that emotional distress will result, there is no cause of action for the intentional infliction of emotional distress. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 81; 480 NW2d 297 (1991). Here, it is clear that pursuant to the Farm Bureau Insurance Agreement customer files remain the "sole and exclusive property" of defendants. The agreement also

provides that customer files "must be surrendered to the Companies at the time of any voluntary or involuntary termination of this Agreement[.]" Therefore, when defendants chose to insist on their legal rights under the contract and recover its files on termination of the agreement, we conclude that there was no cause of action for intentional infliction of emotional distress. *Id*.

VII

Finally, plaintiff argues that the trial court erred in dismissing his defamation claim because defendants' reporting was not privileged and questions of fact existed. In particular, plaintiff raises three separate assertions of defamatory conduct on the part of defendants. He claims that defendants made misrepresentations concerning his termination to another insurance agent named Rose Anouti, Michigan's Office of Financial and Insurance Services (OFIS), and finally, a private company named Cumberland Licensing Corporation (Cumberland). Defendants counter that the trial court properly concluded that plaintiff's defamation claim failed as a matter of law because the alleged defamatory statements were true, and because defendants were entitled to a qualified privilege in reporting the cancellation of plaintiff's agency to OFIS through its reporting agency, Cumberland since they were required to report it. In regard to Anouti, defendant argues that no wrongdoing occurred because the statements were true and made only for the limited purpose of serving defendants' insureds.

A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual. *Mino v Clio School Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003). However, truth is an absolute defense to a defamation claim. *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). A review of the record reveals that on the date of plaintiff's termination, defendants' employee, Doug Drobnis called another agent named Rose Anouti at approximately noon. During this conversation, Drobnis informed Anouti that defendants had closed down plaintiff's agency and that if she received a call from one of plaintiff's customers, she would be responsible for serving those insureds on a temporary basis. In light of this evidence, we conclude that there was no genuine issue of material fact that Drobnis' statements to Anouti were substantially true and, accordingly, were not actionable.

Further, Drobnis' statements were subject to a qualified duty/interest privilege. The elements of this qualified privilege are (1) good faith; (2) an interest to be upheld; (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). A plaintiff may overcome this qualified privilege only by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth. *Id*. General allegations of malice are insufficient to establish a genuine issue of material fact. *Id*. The record evidence establishes that defendants reported information about plaintiff's termination to a proper party, i.e. another of its agents, only in limited scope, and only for the proper business purpose of securing insurance services for its' insureds on a temporary basis. Thus, because a qualified duty/interest privilege existed, we find no error.

Defendant also argues that defendants' report to OFIS through Cumberland created a cause of action for defamation. The trial court disagreed finding that a statutory privilege existed that covered both OFIS and Cumberland. The record reveals that Pamela Hicks, defendants'

employee sent paperwork including documentation of plaintiff's cancellation for cause and the termination letter to OFIS. However, in publishing these materials to OFIS, she sent the materials through Cumberland that is a private company that services OFIS. Hicks testified that Cumberland is not an agency of the state of Michigan, but it is associated with the state because it is part of the network. She stated that Cumberland is a "gateway" to OFIS and that she uses Cumberland to "do our electronic appointments and cancellations through."

MCL 500.1208b(1) states in pertinent part:

> An insurer or authorized representative of the insurer that terminates the appointment, employment, contract, or other insurance business relationship with an insurance producer shall notify the commissioner using a format prescribed by the commissioner of the termination within 30 days following the effective date of the termination . . . .

Thus, pursuant to MCL 500.1208b(1), plainly defendants were obligated to report plaintiff's termination to OFIS and indeed had to use a "format prescribed by the commissioner[.]" The record reveals that providing the information through Cumberland was merely a portal to OFIS and not a separate publication. Finally, MCL 500.1208b(5)[2] applies providing a statutory

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[2] MCL 500.1208b(5) provides that:

> In the absence of actual malice, an insurer, the authorized representative of the insurer, an insurance producer, the commissioner, or an organization of which the commissioner is a member and that compiles the information and makes it available to other commissioners or regulatory or law enforcement agencies is not subject to civil liability for making this information available, and a civil cause of action of any nature shall not arise against these entities or their respective representatives or employees, as a result of reporting or providing any statement or information required by or provided pursuant to this section or any information relating to any statement that may be requested in writing by the commissioner, from an insurer or insurance producer; or a statement by a terminating insurer or insurance producer to an insurer or insurance producer limited solely and exclusively to whether a termination for cause under subsection (1) was reported to the commissioner, provided that the propriety of any termination for cause under subsection (1) is certified in writing by an officer or authorized representative of the insurer or insurance producer terminating the relationship. In any action brought against a person that may have immunity under this subsection for making any statement required by this section or providing any information relating to any statement that may be requested by the commissioner, the party bringing the action shall plead specifically in any allegation that the immunity permitted under this subsection does not apply because the person making the statement or providing the information did so with actual malice. This subsection does not abrogate or modify any existing statutory or common law privileges or immunities.

privilege to defendants absent a showing of actual malice. Plaintiff has not shown actual malice on the part of defendants and thus, his argument fails.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto